Supreme Court, U.S.
FILED
MAR 28 2007
OFFICE OF THE CLERK

No. 06-1161

In the Supreme Court of the United States

P.M. REALTY AND INVESTMENTS, INC.,
A Florida Corporation,
Petitioner,

v.

CITY OF TAMPA, FLORIDA,
A Florida Incorporated Municipality,
Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

BRIEF IN OPPOSITION

RICHARD E. FEE, ESQ.
Counsel of Record
ASSISTANT CITY ATTORNEY
CITY OF TAMPA, FLORIDA
101 E. KENNEDY BLVD., SUITE 3000
TAMPA, FL 33602
(813) 229-8008
(813) 229-0046 FAX

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Should this Court deny the Petition for a Writ of Certiorari because: (i) the State Trial Court clearly and rigorously followed this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*; and (ii) Petitioner failed to identify any way the State Trial Court departed from the accepted and usual course of judicial proceedings so as to require the exercise of this Court's supervisory power?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Origin of the Dispute 2

II. Pretrial and Previous Appellate History 3

III. The Trial 4

A. The City's Legislative Predicate Evidence . . 4

B. P.M. Realty Attempts to "Cast Direct Doubt" on the Predicate 6

C. The City Bolsters the Factual Basis for Its Predicate 8

D. P.M. Realty's Surrebuttal Testimony 12

IV. THE STATE TRIAL COURT'S ORDER. 14

REASONS FOR DENYING THE PETITION 14

I. The State Trial Court Correctly Determined That a Proper Predicate Exists for the City's Adult Use Zoning Regulations 15

A. The City Established the Existence of a Legislative Predicate for the Adult Use Zoning Ordinances 15

B. The Legislative Predicate for the City's Adult Use Zoning Ordinances is Legally Sufficient 16

II. The City's Adult Use Zoning Regulations at Issue Were Constitutionally Applied in the Ybor City Historic District to "Club Flamingo" 18

A. Nude Dancing Facilities, like "Club Flamingo," Generate Adverse Secondary Effects Different From Other Uses 18

B. Petitioner's Property at Issue was Treated the Same as Other Parcels in the Ybor City Historic District 18

C. It was Reasonable, Not Arbitrary, to Apply the City's Adult Use Zoning Ordinances to Petitioner 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) . . . . . *passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 4

DiMa Corp. v. High Forest Township,
2003 WL 21909571 (D. Minn. Aug. 7, 2003) 4

P.M. Realty and Investments, Inc. v. City of Tampa,
779 So. 2d 404 (Fla. 2d DCA 2000) ("P.M. Realty I"),
cert. denied, 786 So. 2d 580 (Fla. 2001) . . . . . *passim*

P.M. Realty and Investments, Inc. v. City of Tampa,
863 So.2d 1269 (Fla. 2nd DCA 2004)
("P.M. Realty II") 3, 4

Peek-A-Boo Lounge of Bradenton v. Manatee County,
337 F.3d 1251 (11th Cir. 2002) 4

Statutes and Rules

Chapter 27, City of Tampa Code . . . . . *passim*

Section 27-1, City of Tampa Code 19

Section 27-191, City of Tampa Code 2

Section 27-272, City of Tampa Code 1, 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, City of Tampa, Florida (the "City"), respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari (the "Petition") filed by Petitioner, P.M. Realty and Investments, Inc. ("Petitioner" or "P.M. Realty") because the Petition fails to establish that any act, omission, or issue in the case below merits this Court's review.

STATUTORY PROVISIONS INVOLVED

In addition to the City of Tampa Code section cited by Petitioner, the pertinent portion of the section reproduced below is involved in this Petition:

Section 27-272, City of Tampa Code, Regulations governing individual special uses.

The following specific standards for individual special uses shall be applied by the city council or the zoning administrator, as appropriate, in determining applications for approval, in addition to the general standards listed above in this article:

Adult use. The following specific standards shall be used in deciding an application for approval of this use:

a. Location:

1. No adult use shall be located within five hundred (500) feet of any residential or office district.

STATEMENT OF THE CASE

The State Trial Court meticulously and generously followed this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Although the Petition complains that some courts encounter difficulty applying *Alameda Books*, nothing in P.M. Realty's Petition specifies any manner how, or any instance in which, the State Trial Court neglected to correctly apply the methodologies or analysis contained in this Court's *Alameda Books* opinion. Rather, the State Trial Court's Order confirms that this Court's burden-shifting analysis mandated by *Alameda Books* was rigorously followed.

In considering the Petition, it is critical to note that the Petitioner's operation of an adult use at the subject property violated two separate provisions of the City of Tampa Code. Not only did Petitioner's use violate Section 27-191, which prohibits adult uses in the Ybor City Historic District, it also violated Section 27-272, because the subject property is located within 500 feet of an office district. Either violation is separately sufficient to justify the permanent injunction entered by the State Trial Court.

I. ORIGIN OF THE DISPUTE.

In February of 1996, P.M. Realty opened a nude dancing emporium named "Club Flamingo" in the heart of the City's nationally-recognized Ybor City Historic District. P.M. Realty's sole shareholder, Joseph Redner, testified at trial that he knew he was violating the law by operating Club Flamingo as an adult use. As far back as 2000, Florida's Second District Court of Appeal concluded that P.M. Realty had opened Club Flamingo in direct violation of the City's existing zoning ordinances. *P.M. Realty and Investments,*

Inc. v. City of Tampa, 779 So. 2d 404, 407-409 (Fla. 2d DCA 2000) ("*P.M. Realty I*"), *cert. denied*, 786 So. 2d 580 (Fla. 2001).

II. PRETRIAL AND PREVIOUS APPELLATE HISTORY

The City filed its Complaint in April of 1996, seeking to enjoin P.M. Realty's operation of a nude dancing emporium within the Ybor City Historic District in violation of the City's zoning ordinances. The City's Complaint alleged P.M. Realty never obtained a Special Use Permit for the operation of an adult use, as required by Chapter 27, Code of Ordinances of the City of Tampa (the "City of Tampa Code"), and that P.M. Realty's operation of an adult use is not permitted in the Ybor City Historic District.

Following seven (7) separate days of hearings, the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (the "State Trial Court") temporarily enjoined P.M. Realty from operating an adult use in the City's Ybor City Historic District. P.M. Realty appealed, and Florida's Second District Court of Appeal (the "Second DCA") unanimously affirmed. *P.M. Realty I*, 779 So. 2d 404.

Following the *P.M. Realty I* decision, the City moved for entry of summary judgment both on the City's Complaint and on P.M. Realty's Amended Counterclaim, which motion was granted. P.M. Realty appealed, and Florida's Second DCA reversed. *P.M. Realty and Investments, Inc. v. City of Tampa*, 863 So.2d 1269 (Fla. 2nd DCA 2004) ("*P.M. Realty II*").

In *P.M. Realty II*, Florida's Second DCA noted that this Court's decision in *Alameda Books*, and opinions from other

federal appellate cases[1] decided since *P.M. Realty I,* imposed a "burden-shifting scheme" for evaluating adult use zoning regulations. Consequently, Florida's Second DCA directed the State Trial Court to "accord P.M. Realty another hearing at which it applies current law to the relevant evidence."

After remand, the City filed its Amended Complaint to add an additional basis for precluding P.M. Realty's operation of an adult use at the site in question -- the site is located within 500 feet of property zoned for office use.

The State Trial Court meticulously followed the *P.M. Realty II* directives. This action was set for a two-day non-jury trial, commencing on November 29, 2004. In response to a motion by P.M. Realty, the State Trial Court issued a Corrective Case Management Order on November 10, 2004, to make it clear that "all three parts of the *Renton*[2] analysis are at issue at the final hearing" and otherwise adopted the Case Management Order. The Case Management Order described in detail the *Alameda Books*-mandated burden-shifting and evidentiary requirements to be used in the final hearing.

III. THE TRIAL.

A. The City's Legislative Predicate Evidence.

P.M. Realty incorrectly states in the Petition that the City "never put any evidence into any record before the City

---

[1] *Peek-A-Boo Lounge of Bradenton v. Manatee County,* 337 F.3d 1251 (11th Cir. 2002); *DiMa Corp. v. High Forest Township*, 2003 WL 21909571 (D. Minn. Aug. 7, 2003) (D. Minn. 2003).

[2] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

Council to justify" and "never had a legislative predicate for" the adult use zoning restrictions at issue.[3] P.M. Realty's misstatements are betrayed by the conclusions and findings contained in the State Trial Court's Order Granting Permanent Injunction, as well as the undisputed evidence at trial.

The City opened its case by presenting evidence documenting the factual predicate supporting the adult use zoning regulations at issue. Specifically, former Chief Assistant City Attorney, Gina K. Grimes, testified regarding the re-enactment of Chapter 27, City of Tampa Code, which contains the adult use regulations at issue, in August of 1990.

The unrebutted testimony of Attorney Grimes established the existence and content of the legislative predicate supporting the preclusion of adult uses from the Ybor City Historic District and the other adult use zoning restrictions at issue. Attorney Grimes testified that she personally presented each of the City Council members with a memorandum identifying all the predicate materials regarding the adult use regulations contained in Chapter 27 and personally discussed the importance of those predicate materials with them. She further testified that the legislative predicate supporting the adult use regulations was received into the record at the public hearings. Finally, Attorney Grimes testified that the City Council members actually considered, and expressly stated their intention to rely upon, the specific predicate materials identified in the State Trial Court's Order in enacting Chapter 27 in August of 1990.

Thus, Petitioner's representation that the City did not "put any evidence into any record before the City Council" or have a legislative predicate for the adult use zoning

---

[3] Petition at p.7.

restrictions at issue is flatly contradicted by the undisputed evidence at trial and the State Trial Court Order at issue.

In concluding her testimony, Attorney Grimes clarified that the enactment of Chapter 27 did not ban adult uses from the City. Rather, adult uses were and are permitted to operate within the City following the enactment of Chapter 27. Specifically, adult uses were permitted uses within the CI (commercial intensive), IG (industrial general), and IH (industrial heavy) zoning districts, subject to the restriction that adult uses must not be located within 500 feet of residential or office districts or with 1000 feet of another adult use. Once again, Attorney Grimes' testimony was unrebutted.

B. P.M. Realty Attempts to "Cast Direct Doubt" on the Predicate.

Following the City's presentation of evidence regarding the legislative predicate for the adult use zoning regulations at issue, the State Trial Court permitted P.M. Realty to present evidence in an attempt to "cast direct doubt" upon that predicate. This, of course, is the precise burden-shifting procedure mandated by *Alameda Books*.

P.M. Realty's first witness was a social psychologist, Randy Fisher, Ph.D., who attempted to critique the evidentiary value of the City's adult use zoning predicate. Dr. Fisher admitted that the studies relating to adult uses and crime he discussed during his direct examination did not include the crimes of prostitution, solicitation of prostitution, or misdemeanor narcotics offenses. He conceded that this omission from his studies reflected "incompleteness" in his analysis.

Some portions of Dr. Fisher's testimony actually bolstered the City's predicate. Dr. Fisher testified that he did not participate in any study casting doubt on City Police Chief Smith's legislative predicate testimony, which drew a correlation between adult uses and prostitution-related offences. In fact, Dr. Fisher testified that Chief Smith's presentation of crime data to the City Council is the kind of raw data on which persons can reasonably rely.

During cross-examination, Dr. Fisher admitted conducting a study which found that a large proportion of people were unwilling to live near adult uses. Dr. Fisher confirmed that his study was methodologically sound and expressed his understanding that this unwillingness of people to live near adult uses is why cities impose zoning restrictions on adult uses.

P.M. Realty's next witness was Terry Danner, Ph.D., a criminology professor who, the State Trial Court noted, "conveniently avoided commenting on prostitution, solicitation, and sexual assaults in his analysis" of the correlation between adult uses and serious crimes. Dr. Danner admitted on cross-examination that his study of crime in Ybor City during 1996, revealed a uniquely criminogenic prostitution "spike" in the crime grid containing Club Flamingo. He also admitted that his later study would have missed a uniquely criminogenic business where the crime in question was prostitution, or solicitation of prostitution, or non-forcible sexual assault.

P.M. Realty then presented Richard Schauseil as a real estate value expert, although he generated two-thirds (2/3) of his income in 2004 from non-real estate activities. Mr. Schauseil testified that he conducted a "time period analysis" to compare real estate values during the time Club Flamingo

was open with the time when it was closed. Mr. Schauseil, however, failed to compare the correct time periods. His four-year "open" period began two years before Club Flamingo opened and his three-year "closed" period included a year in which Club Flamingo was operating. Consequently, Mr. Schauseil's entire comparative study lacked validity.

P.M. Realty concluded its presentation with testimony from Jospeh Redner, its sole shareholder and operator of Club Flamingo. Mr. Redner frankly admitted opening Club Flamingo as a topless club in violation of the City's adult use zoning ordinances: "I knew I was violating the law, yes." Mr. Redner also admitted that the City's Zoning Code treated the Club Flamingo site the same as every other parcel in the Ybor City Historic District.

Mr. Redner also confirmed that his flagship nude club in the City, "Mons Venus," experienced criminal problems. Specifically, Mr. Redner testified that during a single enforcement operation at the Mons Venus, one nude entertainer was arrested for possession of cocaine and another was found to be under the age of eighteen. Finally, Mr. Redner recalled an incident where one of the Mons Venus' nude entertainers was shot in the breast while inside a car in the parking lot with her assailant, a man with whom, according to Mr. Redner, she had a "special financial arrangement."

C. The City Bolsters the Factual Basis for Its Predicate.

In accordance with this Court's *Alameda Books* decision, the State Trial Court permitted the City to present additional evidence to bolster the factual basis for the legislative predicate supporting the City's adult use zoning regulations.

The City first presented the testimony of Ethel Hammer, a land use planner with 26-years of experience in the City. Ms. Hammer testified that, as a professional land use planner, she evaluates daily the impacts of certain land uses upon adjoining uses to determine the appropriate location for those land uses.

Ms. Hammer conducted three studies within the City to test the legislative bases for the City's zoning restrictions imposed on adult uses – that their presence is linked to crime and they negatively impact surrounding residential and office properties.

In her first study, Ms. Hammer compared the rates of absentee ownership in residential neighborhoods located within 500 feet of adult uses with residential neighborhoods located within 500 feet of neighborhood bars and residential neighborhoods located within 500 feet of churches. Ms. Hammer testified that higher rates of absentee ownership, where the property owners lease rather than live on their property, evidences deterioration in a neighborhood's integrity and a loss of confidence in that neighborhood. Her study found a "much higher rate of absentee ownership" in residential neighborhoods adjacent to adult uses than in those adjacent to neighborhood bars or churches.

Ms. Hammer's second study compared the number of crimes per acre in neighborhoods located within 500 feet of adult uses with neighborhoods located within 500 feet of neighborhood bars and neighborhoods located within 500 feet of churches. Her study focused on the crimes of sexual assault, simple assault, drug offences, and prostitution. This study found a "significantly higher" average number of those crimes per acre in residential neighborhoods adjacent to adult uses than in those neighborhoods adjacent to bars or churches.

Ms. Hammer testified that the impacts of neighborhood bars and churches were very similar on adjoining neighborhoods, but the impact of adult uses stood out.

In sum, Ms. Hammer testified that her first two studies evidence that adult uses do, in fact, contribute both to a loss of confidence in the residential neighborhoods adjacent to adult uses and to an increase in crime. The data regarding absentee ownership also paralleled the legislative predicate evidence relied upon by the City.

Ms. Hammer verified the findings in her first two studies via personal observations made by driving through the neighborhoods she studied. In doing so, she observed that the residential neighborhoods located within 500 feet of adult uses demonstrated a lack of investment and upkeep. Conversely, the maintenance in neighborhoods located within 500 feet of neighborhood bars and churches appeared significantly better.

Based upon her first two studies and her observations of the residential neighborhoods studied, Ms. Hammer opined that "adult uses do have adverse secondary effects on residential neighborhoods."

Ms. Hammer's third study compared the vacancy rates of office buildings located within 500 feet of adult uses with office buildings located more than 500 feet from adult uses. Her study, based upon published quarterly reports, showed that office buildings located within 500 feet of adult uses experience much higher vacancy rates than those office buildings located more than 500 feet from adult uses.

Ms. Hammer then explained that the Ybor City Historic District is listed on the National Register of Historic Places via the National Park Service, and is one of very few such

designated areas in Florida. She also explained that the reason for prohibiting adult uses from the Ybor City Historic District was the desire to foster a compatible mix of uses, including residential and commercial uses, to promote economic development in this unique area.

In concluding her testimony, Ms. Hammer opined that adult uses do have adverse impacts on residential and office development. As a land planner, she opined that adult uses would not be compatible with other uses the City is attempting to promote in the Ybor City Historic District.

The City supplemented Ms. Hammer's testimony with the testimony of two City police personnel. First to testify was Major Jane Castor, former commander of the City's Criminal Intelligence Bureau and the supervisor for the City's law enforcement efforts regarding adult uses from 1998 through 2001. Major Castor testified that acts of prostitution were widespread in adult uses featuring nude dancing and that adult uses also served as places at which off-site prostitution was arranged. Major Castor noted that she was not aware of any land uses, other than nude dancing clubs and massage parlors, that generated prostitution. She specifically testified that she did not find any instances of people arranging for prostitution in restaurants and nightclubs.

Before resting, the City called Police Detective John Sluckis, an 8-year veteran officer involved in making prostitution arrests. Detective Sluckis testified that he was involved in numerous prostitution arrests in adult uses in the City, but never received any information about prostitution occurring in bars or restaurants in the City.

The City then argued that, under this Court's burden shifting scheme in *Alameda Books*, the proceedings were complete.

D. P.M. Realty's Surrebuttal Testimony.

P.M. Realty requested permission to call a previously unavailable witness and to recall Dr. Fisher and Mr. Schauseil in surrebuttal. Over the City's objection, the State Trial Court granted P.M. Realty's request and expressly granted P.M. Realty an additional one-half day to present the requested surrebuttal testimony. Such surrebuttal granted P.M. Realty due process protections beyond those required in *Alameda Books*.

Apparently not content with its requested surrebuttal, P.M. Realty then disclosed its intent to call a total of seven (7) witnesses over one and one-half (1½) days. Again over the City's objection, the State Trial Court ruled that P.M. Realty could present the testimony of the previously unavailable witness, recall Drs. Danner and Fisher for one-half hour each, and could also call two new witnesses, as well as recalling P.M. Realty's owner.

The trial recommenced on April 12, 2005, more than four months after the City presented its last witness. P.M. Realty first called Joseph Malone, a private investigator and process server. Mr. Malone's research of instances of prostitution, non-forcible sexual assault, and narcotics offences in the Club Flamingo's crime grid for 1996 and 1997 directly contradicted the testimony of P.M. Realty's criminologist, Dr. Danner.

Dr. Fisher was called next. He testified that he had been working on his rebuttal to Ms. Hammer's testimony for four

months. Although he took issue with her study methodology, Dr. Fisher did not present any evidence or studies to refute Ms. Hammer's factual findings regarding higher absentee ownership in residential neighborhoods and higher vacancy rates in office buildings within 500 feet of adult uses.

P.M. Realty then called one of its new expert witnesses, Eric Rahenkamp, a land use planner and landscape architect. Like Dr. Fisher, Mr. Rahenkamp did not contradict Ms. Hammer's findings, but instead criticized her methodology. Two main critiques were Ms. Hammer's inclusion of "Wild Gentlemen's Club" as an adult use, and her use of data from the Hillsborough County Property Appraiser's website. His critiques, however, were directly contradicted by P.M. Realty's other new expert witness, Eric Roahrig, who later testified that it was proper to treat "Wild Gentlemen's Club" as an adult use and to use data from the Hillsborough County Property Appraiser's website. Mr. Rahenkamp also agreed with Ms. Hammer that absentee ownership is an indicator of a declining neighborhood.

Unlike P.M. Realty's other witnesses, Erick Roahrig, a self-employed real estate appraiser, attempted to do studies to undermine Ms. Hammer's data regarding residential absentee ownership and office vacancy. Importantly, Mr. Roahrig did not quarrel with the methodology of Ms. Hammer's absentee ownership study.

Mr. Roahrig's own absentee ownership data validated Ms. Hammer's conclusion that the rate of absentee ownership of single-family residences was measurably higher in neighborhoods impacted by adult uses than those that were not. Mr. Roahrig testified, however, that his study did <u>not</u> try to determine what percentage of single-family <u>residences</u> were absentee owned.

Of note, the only portion of Mr. Roahrig's study that correctly measured the City's 500 foot setbacks confirmed Ms. Hammer's conclusion that office vacancy rates were higher in those buildings within 500 feet of adult uses than in those further away. The remainder of his study used a 1000 foot setback from adult uses, rather than a 500 foot setback. This resulted in his inclusion of office buildings beyond 500 feet from adult uses in his calculations of buildings within 500 feet from adult uses. This same error also resulted in office buildings beyond 500 feet from adult uses being excluded from his calculations of that category. Consequently, no witness contradicted Ms. Hammer's data regarding absentee ownership of single family residences or office vacancy rates. Mr. Roahrig's testimony concluded the presentation of evidence.

Closing arguments were held on July 27, 2005, and the case was submitted to the State Trial Court.

IV. THE STATE TRIAL COURT'S ORDER.

On August 16, 2005, the State Trial Court entered its eight-page Order Granting Permanent Injunction which recounts the witnesses who testified and contains in-depth legal discussion. In response, P.M. Realty moved for a rehearing or clarification, which the State Trial Court denied. P.M. Realty then appealed to Florida's Second DCA, which unanimously affirmed in a *per curium* opinion.

REASONS FOR DENYING THE PETITION

Nothing in the Petition (or in the proceedings below) justifies the granting of a writ of certiorari in this case. Indeed, the Petition fails to identify any way in which the State Trial Court (as opposed to other courts in other cases)

failed to faithfully follow the dictates of *Alameda Books*. A review of the State Trial Court's Order confirms that the evidentiary burden-shifting requirements of *Alameda Books* were not only met in this case, but were exceeded.

I. THE STATE TRIAL COURT CORRECTLY DETERMINED THAT A PROPER PREDICATE EXISTS FOR THE CITY'S ADULT USE ZONING REGULATIONS.

A. The City Established the Existence of a Legislative Predicate for the Adult Use Zoning Ordinances.

The unrebutted evidence at trial established that the City enacted the adult use zoning ordinances at issue in August of 1990. Without any doubt, Chapter 27 of the City's Zoning Code contains the adult use zoning ordinances at issue. Chapter 27 was re-adopted in August of 1990. No evidence exists to the contrary. The unrebutted evidence also demonstrated that the City submitted, and that the City Council members relied upon, predicate materials supporting the rationale for the adult use zoning regulations at issue during their adoption in August of 1990.

The legislative predicate materials identified by the State Trial Court in its order on appeal were unquestionably introduced and considered during the 1990 adoption. Attorney Grimes' un-impeached and uncontradicted testimony established that the legislative predicate materials identified in the order on appeal were expressly discussed with each member of the City Council individually, presented to City Council at public hearing, filed with the City Clerk, and the City Council expressly stated that it was their intention to rely on those materials in re-adopting the Zoning Code.

B. The Legislative Predicate for the City's Adult Use Zoning Ordinances is Legally Sufficient.

Having established the existence of a predicate at the time the adult use zoning ordinances at issue were enacted, the question becomes whether the State Trial Court reasonably concluded that the City's predicate was legally sufficient under *Alameda Books*. The clear answer to this question is yes.

The *Alameda Books* test for a legally sufficient predicate is "whether the City could reasonably rely on the proffered predicate to demonstrate that the ordinance at issue serves the legitimate governmental interest of that ordinance." 535 U.S. at 430. This Court further explained that a legislative predicate supporting adult use zoning regulations is constitutionally sound if "[t]he municipality's evidence . . . fairly support[s] the municipality's rationale for its ordinance." 535 U.S. at 438-9.

The predicate materials unquestionably demonstrate that the adult use ordinances at issue serve the City's legitimate governmental interests. Materials within the predicate support the 500 foot setback of adult uses from residentially-zoned property. Dr. Robert W. Taylor's study demonstrated that 92% of 472 City residents surveyed would not buy a house located within 500 feet of an adult entertainment center. Moreover, City Planner Tammy Jenkins stated during her presentation contained within the predicate materials that adult uses have a significant effect on neighborhood decline with a resulting lack of investment and loss of confidence in the viability of the neighborhoods.

The predicate materials also support the 500 foot setback of adult uses from property zoned for office use. Dr. Robert

W. Taylor's study found 91% of 472 Tampa residents surveyed would not locate a personal business within 500 feet of an adult entertainment center. Additionally, Police Chief Robert L. Smith testified in the predicate materials that the City Police Department received complaints from business people working next to adult businesses, including 75 complaints in a single four-month period of male patrons masturbating in the parking lots behind the cars.

Finally, the predicate materials support precluding adult uses from the Ybor City Historic District. Because the Ybor City Historic District contains residential and office zoned property, the predicate materials discussed above support the City's decision to not permit adult uses in that district.

Further, the testimony of former Police Chief Smith regarding the crime related to adult uses in Tampa supports their exclusion from the Ybor City Historic District. Police Chief Smith testified that there were 56 arrests in nude dancing bars for prostitution related and lewd and lascivious offenses. Importantly, Chief Smith expressly testified based upon his first-hand experience as a Major in charge of the vice squad having had "daily contact with the problem." Certainly, it was reasonable and not an abuse of discretion, for the State Trial Court to conclude that the City Council could have "reasonably relied" on the predicate at issue "to demonstrate that the ordinance at issue serves the legitimate governmental interest of that ordinance." *See Alameda Books*, 535 U.S. at 430.

In sum, the State Trial Court correctly concluded, and did not abuse its discretion in finding, that the City had a legally-sufficient predicate during the August of 1990, enactment of the adult use zoning ordinances at issue.

II. THE CITY'S ADULT USE ZONING REGULATIONS AT ISSUE WERE CONSTITUTIONALLY APPLIED IN THE YBOR CITY HISTORIC DISTRICT TO "CLUB FLAMINGO."

A. Nude Dancing Facilities, like "Club Flamingo," Generate Adverse Secondary Effects Different from Other Uses.

The unrefuted evidence at trial clearly supported a reasonable conclusion that nude dancing facilities generate prostitution and related offenses, while bars and restaurants do not. Additionally, the evidence at trial also established that nude dancing facilities adversely impact neighboring residential and office districts in ways that neighborhood bars and churches do not. Thus, Petitioner's Club Flamingo is precisely the type of use -- a nude dancing facility -- that generates the adverse secondary effects the City's adult use zoning ordinances are designed to address.

B. Petitioner's Property at Issue was Treated the Same as Other Parcels in the Ybor City Historic District.

Nothing about the location of Petitioner's Club Flamingo makes the application of the City's adult use zoning regulations at issue arbitrary. Petitioner's site is "being treated the same as other parcels in that area. None of the parcels can be used for adult uses." *P.M. Realty I*, 779 So.2d at 409. P.M. Realty's owner, Mr. Redner, himself admitted that the City's Zoning Code treated the Club Flamingo site the same as every other parcel in the Ybor City Historic District. Thus, no supportable claims of disparate treatment exist in this case.

C. It was Reasonable, Not Arbitrary, to Apply the City's Adult Use Zoning Ordinances to Petitioner.

The City's adult use zoning ordinances were not arbitrarily applied to the Petitioner's locus for Club Flamingo. First, the adult use zoning regulations at issue, which prohibit the location of adult uses in the Ybor City Historic District and require a 500 foot setback from office zoned property, clearly "promote or tend or be designed to promote" the intent of the City's Zoning Code. The purpose of the City's Zoning Code, in relevant part, is:

> to promote the public health, safety, morals, convenience, comfort, amenities, prosperity, and general welfare of the city and to provide, among other matters, a wholesome, serviceable and attractive community; to increase the safety and security of home life; to preserve and create a more favorable environment in which to rear children; to stabilize and enhance property and civic values . . . .

Section 27-1, City of Tampa Code. This fact is demonstrated by the City's predicate, especially as that predicate was bolstered at trial. Therefore, the City's adult use zoning ordinances are a valid exercise of the City's police power.

Sound, legitimate, and well-documented reasons support precluding adult uses, such as Club Flamingo, from locating in the Ybor City Historic District and within 500 feet of office and residentially-zoned property.[4] The State Trial Court correctly concluded and did not abuse its discretion in concluding that those ordinances, as applied to Petitioner's

---

[4] Petitioner admitted Club Flamingo is located in the Ybor City Historic District and within 500 feet of office-zoned property.

nude entertainment facility, are constitutional and not arbitrary.

CONCLUSION

While other courts in other jurisdictions may (or may not) struggle with following this Court's evidentiary burden-shifting procedure set forth in *Alameda Books*, the State Trial Court clearly experienced no such difficulties. The order on appeal clearly indicates that *Alameda Books* was rigorously followed in this case and that Petitioner was afforded more opportunities to attack the City's legislative predicate than this Court requires. Simply put, Petitioner failed to carry its burden at trial despite every opportunity to do so. Petitioner failed to specify any ruling, process, or procedure of the State Trial Court that flies in the face of *Alameda Books*. For all the foregoing reasons, this Court should deny P.M. Realty's Petition and leave undisturbed the State Trial Court's August 15, 2005, Order Granting Permanent Injunction.

Respectfully submitted,

Richard E. Fee, Esq.
Counsel of Record
Assistant City Attorney
CITY OF TAMPA, FLORIDA
101 E. Kennedy Blvd., Suite 3000
Tampa, Florida 3360
(813) 229-8008 Telephone
(813) 229-0046 Facsimile

Counsel for Respondent